Office-Supreme Court, U.S.
FILED
JAN 14 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-939

In The
Supreme Court of the United States
October Term, 1984

JAPAN AIR LINES CO., LTD.,
Petitioner,

v.

STANLEY ABRAMSON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

PECKAR & ABRAMSON, P.C.
Counsel for Respondent
Stanley Abramson
223 Moore Street
Hackensack, New Jersey 07601
(201) 343-3434

BRUCE D. MELLER
ERNEST F. SALZSTEIN
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Are state common law claims brought by a passenger for bodily injury resulting from an airline's negligence or willful misconduct during an international flight barred where it is determined that the claims do not arise out of an "accident" within the meaning of Article 17 of the Warsaw Convention and, if not barred, are the state common law claims subject to the limitation on recoverable damages provided by the Warsaw Convention.

Petitioner contends that this Court should grant its petition for certiorari because *Saks v. Air France,* 724 F.2d 1383 (9th Cir.), *cert. granted,* — U.S. —, 105 S.Ct. 80 (U.S. Oct. 1, 1984) (No. 83-1785), a case purportedly involving a similar question, is pending before the Court. The issue presented in *Saks,* which solely involves the definition of the term "accident" within the scope of Article 17 of The Warsaw Convention, is totally extraneous to the question presented herein. In this case the Court below specifically found that there was no "accident" and petitioner supports that finding.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Statement of Procedural History 1

C. Statement of Facts 3

ARGUMENT:

PETITIONER'S CLAIM THAT THE CIRCUIT COURTS ARE IN CONFLICT IS WITHOUT MERIT. 5

A. The Courts Are In Agreement That State Common Law Claims Are Not Precluded By The Warsaw Convention In The Absence Of An Accident. 5

B. The Absence Of An Accident Precludes The Application Of The Warsaw Convention. 8

C. *Benjamins v. British European Airways* Does Not Address The Issues Presented By This Case. 9

CONCLUSION 12

TABLE OF AUTHORITIES

Pages

Cases Cited

Abramson v. Japan Airlines, 587 F.Supp. 1099 (D.N.J. 1983), *aff'd in part and rev'd in part,* 739 F.2d 130 (3d Cir. 1984) 9

Adamsons v. American Airlines, Inc., 105 Misc.2d 787, 433 N.Y.S.2d 366 (New York Co. 1980), *aff'd,* 87 App.Div.2d 785, 449 N.Y.S.2d 487 (1st Dept. 1982) 7

Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied,* 439 U.S. 905 (1979) 9, 10, 11, 12

Berman v. Trans World Airlines, 101 Misc.2d 511, 421 N.Y.S.2d 291 (New York Co. 1979) 7

Block v. Compagnie Nationale Air France, 386 F.2d 327 (5th Cir. 1967), *cert. denied,* 392 U.S. 905 (1968) 8

Domanque v. Eastern Airlines, Inc., 722 F.2d 256 (5th Cir. 1984) 8

Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1976), *cert. denied,* 430 U.S. 950 (1977) 7

Hill v. United Airlines, 550 F.Supp. 1048 (D.Kan. 1982) 7

Husserl v. Swiss Air Transport Co., LTD., 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd,* 485 F.2d 1240 (2d Cir. 1973) 5, 6, 9, 10

Husserl v. Swiss Air Transport Company, LTD., 388 F.Supp. 1238 (S.D.N.Y. 1975) 8

In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301 (9th Cir. 1982) 8

Komlos v. Compagnie Nationale Air France, 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds,* 209 F.2d 436 (2d Cir. 1953) 10

TABLE OF AUTHORITIES—Continued

Pages

Maghsoudi v. Pan American World Airways Inc., 470 F.Supp. 1275 (D.Haw. 1979) 7

McDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971) 7, 8

Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957) 10

Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977) 8

Saks v. Air France, 724 F.2d 1383 (9th Cir.), *cert. granted*, — U.S. —, 105 S.Ct. 80 (U.S. Oct. 1, 1984) (No. 83-1785) i

Scherer v. Pan American World Airways, 54 App. Div.2d 636, 387 N.Y.S.2d 581 (1st Dept. 1976) 7

STATUTES AND OTHER AUTHORITIES

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876; 137 L.N.T.S. 11, reprinted in 49 U.S.C. § 1502 note (1970) [The Warsaw Convention] ..... passim

The United States and The Warsaw Convention, 80 Harv. L. Rev. 497 (1967) 8

The Cause of Action Under the Warsaw Convention (parts I & II) 26 J. Air. L. & Comm. 217 & 323 (1959) 11

Article 17 of the Warsaw Convention ..... passim

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

Plaintiff-respondent, Stanley Abramson, seeks to recover money damages from defendant-petitioner, Japan Air Lines, for personal injuries sustained and aggravated as a result of the actions and omissions of petitioner on Japan Air Lines Flight No. 005 on August 23-24, 1982. Said actions and omissions, in respondent's view, constitute actionable negligence and/or wilful misconduct under the common law of the State of New Jersey. The action at its inception included an additional or alternative claim for relief founded upon the provisions of the Warsaw Convention.

B. Statement of Procedural History

The action was commenced by the filing of a Complaint on or about December 3, 1982 in the Superior Court of New Jersey, County of Essex, State of New Jersey. On or about December 23, 1983, defendant, Japan Air Lines, removed the action to the United States District Court, District of New Jersey, then serving and filing an Answer to the Complaint.

On or about August 26, 1983, the petitioner filed a motion to dismiss the Complaint for failure to state a claim upon which relief can be granted or, alternatively, for a partial summary judgment limiting petitioner's liability to a maximum of $75,000.00. The motion was originally returnable on September 26, 1983.

Prior to the initial return date, and on or about September 12, 1983, all counsel agreed to an adjournment of the return date of the motion until October 11, 1983.

In reliance upon the adjourned return date, respondent's opposition to said motion was filed on September 27, 1983.

Due to a clerical error, the party's written stipulation, consent order, regarding the adjournment was not received by the District Court as of the original September 26, 1983 return date. Thus, on September 26, 1983, the District Court, decided the motion and thereupon filed a Memorandum Decision. App.11a.* In its Memorandum Decision, the District Court held that respondent's liability to petitioner could only be predicated upon Article 17 of the Warsaw Convention, which Article pertains to liability, only in case of an accident. Finding that the circumstances alleged did not constitute an "accident" within the meaning of Article 17, the District Court entered summary judgment with respect to both respondent's statutory (*i.e.,* Warsaw Convention) claims and respondent's common law claims of negligence and wilful misconduct. With respect to the latter set of claims, the court specifically found them to be irrelevant, holding that "the absence of an 'accident' precludes liability, both compensatory and punitive." App.16a.

Upon the receipt of a copy of this decision on September 28, 1983, respondent's counsel wrote and informed the District Court of the clerical error which led the court to consider the motion as unopposed. The District Court thereupon treated this correspondence as a motion to amend or alter the judgment. App.21a.

On October 11, 1983, following oral argument and upon a consideration of respondent's September 27, 1983

---

*References are to appendix contained in petitioner's brief.

opposition to the petitioner's motion, the court reaffirmed its prior judgment. App.20a.

Appeal was taken to the United States Court of Appeals for the Third Circuit. On July 19, 1984 the Court of Appeals filed a unanimous decision and opinion concluding that although an "accident" pursuant to the terms of the Warsaw Convention had not occurred, respondent possessed a right of recovery under its state common law claims. App.10a.

Petitioner filed a petition for rehearing, which was denied by Order of the Court of Appeals dated September 14, 1984. App.24a.

On or about December 12, 1984 the instant petition for a writ of certiorari was filed.

C. Statement of Facts

On August 23, 1982, respondent, Stanley Abramson, and his wife were passengers aboard Japan Air Lines Flight No. 005 from New York to Tokyo, Japan. Approximately 45 minutes subsequent to a brief intermediate stop in Anchorage, Alaska, respondent began to suffer extreme and traumatic physical discomfort in his stomach area resulting from the activation of a pre-existent paraesophageal hiatal hernia condition. Petitioner's in-flight personnel were immediately advised as to the nature of such condition, which condition resulted in repeated and violent outbursts of vomiting observed by such personnel.

In the past, respondent had always been able to successfully counteract the same condition by lying down and gently moving from side to side. These facts were

related to petitioner's in-flight personnel with a request that respondent be provided with a location on the plane in which to lie down. The request was repeatedly refused by petitioner on the alleged basis that no such space was available as all seats were occupied.

Petitioner took no action to assist respondent, despite the fact that petitioners in-flight purser observed respondent's increasingly deteriorating condition and, there were nine empty seats in the first class section of the airplane in which respondent could have been afforded the necessary opportunity to lie down and, alleviate his condition.

As a result of the aforesaid, respondent's condition worsened significantly during said flight, necessitating emergency hospitalization and treatment on his arrival in Japan. Thereafter, and on the advice of a Japanese physician, respondent and his wife returned immediately to the United States for treatment of aspiration pneumonia which respondent had contracted and subsequent surgical reimplantation of respondent's stomach in his abdomen and repair of the hiatal hernia. According to an expert medical evaluation, both the pneumonia and the hernia strangulation would have been avoided, and the surgery rendered unnecessary, had petitioner provided respondent with the requested space in which to lie down for self-treatment.

———o———

ARGUMENT

PETITIONER'S CLAIM THAT THE CIRCUIT COURTS ARE IN CONFLICT ON ISSUES PRESENTED BY THIS CASE IS WITHOUT MERIT.

A. The Courts Are In Agreement That State Common Law Claims Are Not Precluded by The Warsaw Convention In the Absence of an Accident.

Petitioner's plea for the granting of Certiorari in this matter is predicated upon its argument that respondent's claim is governed exclusively by the provisions of the Warsaw Convention.

This premise has routinely been rejected by every court which has considered the question.

One such case, with issues strikingly similar to the instant matter, *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd.*, 485 F.2d 1240 (2d Cir. 1973), concerned claims alternatively based upon the Warsaw Convention and state common law (breach of contract of safe carriage and negligence), asserted by a passenger on a hijacked airliner against a defendant-carrier.

The defendant in *Husserl* moved to dismiss the complaint for failure to state a claim upon which relief can be granted. *Id.* at 704. The *Husserl* Court concisely stated the positions of the parties as follows:

> [plaintiff] asserts that her right of recovery under the second and third counts of the complaint are independent of the Convention. Defendant, on the other hand, argues that the convention regulates liability between the parties, that this regulation preempts

any and all common law rights of action, and that absent an "accident" there is no liability.

Id. at 704-705. The *Husserl* Court rendered its decision squarely in favor of plaintiff's position reasoning as follows:

> As I understand it, *the Convention does not "exclusively regulate" the relationship between passenger and carrier on an international flight, but rather sets limits on and renders uniform certain of the aspects of that relationship.* Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), cert. denied 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957); Zousmer v. Canadian Pacific Air Lines, Limited, 307 F. Supp. 892 (S.D.N.Y. 1969); Komlos v. Compagnie Nationale Air France, 111 F.Supp. 393 (S.D.N.Y. 1952), rev'd on other grounds, 209 F.2d 436 (2d Cir. 1953); Lowenfeld and Mendelsohn, The United States and the Warsaw Convention, supra n. 1, 80 Harv.L. Rev. at 519. Indeed, it has been held that the convention creates no new right of action, but rather creates " . . . a presumption of liability, leaving it for local law to grant the right of action." Noel v. Linea Aeropostal Venezolana, supra, 247 F.2d at 679. Since it is a treaty, it is the supreme law of the land, pre-empting local law in the areas where it applies. U.S.Const. Art. VI; United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937); Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798 (2d Cir. 1971). Thus, it would seem to follow that if the Convention "applies", it applies to limit—not eliminate—liability; *if it does not apply, it leaves liability to be established according to traditional common law rules.* [Emphasis supplied].

Id. at 706.

The *Husserl* court is not alone in holding that the Convention neither limits nor eliminates common law claims in the absence of an accident within the scope of

Article 17. *See e.g., Hill v. United Airlines,* 550 F.Supp. 1048, 1054 (D.Kan. 1982) (holding that since Article 17 applies only to "accidents," plaintiff's claim against international carrier for misrepresentations of its employees was cognizable under common law and unaffected by the Convention); *Adamsons v. American Airlines, Inc.,* 105 Misc.2d 787, 433 N.Y.S.2d 366 (New York Co. 1980), *aff'd.,* 87 App. Div.2d 785, 449 N.Y.S.2d 487 (1st Dept. 1982) (absent an accident, personal injury plaintiff held entitled to recover for negligence in accordance with common law and unaffected by Convention's liability limitation); *Maghsoudi v. Pan American World Airways, Inc.,* 470 F.Supp. 1275, 1280 (D.Haw. 1979); *Berman v. Trans World Airlines,* 101 Misc.2d 511, 421 N.Y.S.2d 291 (New York Co. 1979); *Scherer v. Pan American World Airways,* 54 App. Div.2d 636, 387 N.Y.S.2d 581 (1st Dept. 1976) (upon finding that no accident had occurred, only counts arising under Warsaw Convention dismissed, leaving plaintiff free to pursue common law claims); *Hernandez v. Air France,* 545 F.2d 279, 284 (1st Cir. 1976), *cert. denied,* 430 U.S. 950 (1977) (holding that in a "grey area" not clearly covered by Article 17, plaintiff would be entitled to pursue "the remedies of local law"); *McDonald v. Air Canada,* 439 F.2d 1402, 1404 (1st Cir. 1971) (upon determination that no accident had occurred, court considers plaintiff's claim of common law negligence).

Petitioner has not cited, nor can there be found a case which supports its position that state common law claims are precluded in situations found to fall outside the purview of Article 17 of the Convention because of the absence of an "accident".

Accordingly there is agreement among the courts that the Warsaw Convention neither limits nor eliminates state common law claims in the absence of an accident.

B. The Absence of an Accident Precludes the Application of The Warsaw Convention.

A principal objective of the Warsaw Convention was to limit the airlines liability and afford them protection from exposure to potentially huge personal injury suits resulting from disastrous airplane accidents. *Domanque v. Eastern Airlines, Inc.*, 722 F.2d 256, 261 (5th Cir. 1984); *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1311 (9th Cir. 1982); *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977); *Block v. Compagnie Nationale Air France*, 386 F.2d 327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *Husserl v. Swiss Air Transport Company, Ltd.*, 388 F. Supp. 1238, 1244 (S.D.N.Y. 1975); *The United States and The Warsaw Convention*, 80 Harv.L.Rev. 497 (1967).

It is well settled that the Convention recognizing the inherent difficulties in proving liability in complex airplane accidents, included provisions for a limitation of financial liability as the *quid pro quo* for the presumption of liability included in Article 17. *MacDonald v. Air Canada, supra* at 1405; *Block v. Compagnie Nationale Air France, supra; Husserl v. Swiss Air Transport Company, Ltd.*, 388 F.Supp. 1238, 1244 (S.D.N.Y. 1975); *The United States and The Warsaw Convention, supra* at 500.

However, in the matter before this Honorable Court, the Court of Appeals has concluded, (a finding unchallenged by petitioner), that the requisite "accident" for

which the Warsaw Convention limits the liability of the carrier is not present. *Abramson v. Japan Air Lines*, 739 F.2d 130 (3d Cir. 1984).

Nonetheless, petitioner would have this Honorable Court adopt the following reasoning:

(a) The Warsaw Convention, as a treaty of the United States is the supreme law of the land;

(b) Article 17 of The Warsaw Convention posits an "accident" as a condition precedent to recovery thereunder.

(c) Therefore, absent an "accident", there can be no recovery whatsoever.

This conclusion is illogical because it would leave persons injured by the wrongdoing of others totally without remedy. It is also outside at the stated purpose of the Warsaw Convention, which is simply to limit damages recoverable against an international air carrier in the event of a disaster.

Accordingly, the absence of an accident precludes the application of the Convention and leaves an injured passenger with his common law rights.

C. Benjamins v. British European Airways Does Not Address The Issues Presented by This Case.

Petitioners' brief argues that *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973), cited by both the courts below and respondent has been effectively overruled by *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114

(1979). Petitioner postulates that *Husserl,* since it relies upon *Komlos v. Compagnie Nationale Air France,* 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds,* 209 F.2d 436 (2d Cir. 1953) and *Noel v. Linea Aeropostal Venezolana,* 247 F.2d 677 (2d Cir.), *cert. denied,* 355 U.S. 907 (1957) which were "expressly overruled" by *Benjamins,* is thereby no longer valid and therefore begs this Honorable Court to conclude that the principles for which *Husserl* has been cited are no longer authoritative. A reading of *Benjamins,* together with *Komlos* and *Noel* must lead to the conclusion that this argument has no merit.

The pertinent question considered in *Komlos, supra,* concerned whether the sister of a decedent, killed in an airplane crash while on a flight from Paris to New York, had a beneficial interest in the cause of action for wrongful death. In answering this question, the District Court considered whether the Convention itself created a cause of action for wrongful death. *Supra,* 111 F.Supp at 398-399. That court concluded that "the Warsaw Convention does not create a right of action for wrongful death". *Id.* at 401.

The pertinent issue presented in *Noel, supra,* was whether the plaintiff may bring a civil action based on the Warsaw Convention for a death which allegedly occurred in the airspace over the high seas. The Court of Appeals held:

> we agree with our prior decision in Komlos v. Compagnie Nationale Air France, 2 Cir., 1953, 209 F.2d 436, 438, which impliedly agreed with Judge Leibell's Decision, Komlos v. Compagnie Nationale Air France, D.C.S.D.N.Y. 1952, 111 F.Supp. 393, that the Convention did not create an independent right of action.

Id. 247 F.2d 678-679.

In *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert denied*, 439 U.S. 1114 (1979), a suit was brought on behalf of a decedent's estate against an international air carrier and foreign aircraft manufacturer to recover for wrongful death. The suit resulted from the crash of a British European Airways flight which had taken off from London's Heathrow Airport and was bound for Brussels. The threshold question presented on appeal was whether federal question jurisdiction, which hinged upon whether the Warsaw Convention created a substantive cause of action under a United States Treaty, was available to the plaintiff. In these circumstances, the Second Circuit was again presented with an opportunity to reconsider whether the Warsaw Convention creates a cause of action for wrongful death. At this juncture, the Court of Appeals reversed its previous posture and held that the Convention does indeed create such a cause. *Id.*, 572 F.2d 914-915. In so doing, The Second Circuit Court of Appeals simply provided a federal forum for claims asserted under the Warsaw Convention regardless of the absence of diversity of citizenship. It did not consider, imply nor rule that this newly created right of action was intended to be exclusive. If reliance is placed upon the view of the Chairman of the United States Delegation to the Hague Conference to Amend the Warsaw Convention, as it was by the Court of Appeals at 572 F.2d 917 fn.8, his view was that the right was non-exclusive. Calkins, *The Cause of Action Under the Warsaw Convention* (parts I & II), 26 J. Air. L. & Comm. 217 & 323, 327 (1959). Therefore, if *Benjamins* is relevant to this matter, it supports respondent's position that a cause of action may exist independent of the Warsaw Convention.

However the situation presented by the instant suit may be easily distinguished from *Benjamins*. *Benjamins* involved an air crash in which 122 passengers were killed, while in the instant suit, a single personal injury suit is brought under circumstances wherein the courts below have determined that the requisite accident on which the Warsaw Convention liability may be based, is lacking. App.6a. Thus, it is clear that neither the circumstances nor the issues considered in *Benjamins* are similar or relevant in the matter now presented to this Honorable Court.

—o—

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

PECKAR & ABRAMSON, P.C.
Counsel for Respondent

By: /s/ BRUCE D. MELLER

DATED: January 11, 1985